

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES LAMONT RICHARDSON,

Defendant.

1:97-CR-05129 OWW

ORDER RE DEFENDANT'S REQUEST
FOR RECREATION OF HIS CASE
FILE AND FOR AN EXTENSION OF
TIME TO FILE A PETITION FOR
WRIT OF HABEAS CORPUS UNDER
28 U.S.C. § 2255.

Before the court for decision are several motions filed by Defendant James Lamont Richardson. First, Defendant requests that his case records and files, which were apparently lost in the mail, be reproduced and sent to him. Second, Defendant requests and extension of time within which to file a petition for writ of habeas corpus on the ground that he was unable to timely file a petition because he did not have access to his case records and files.

I. BACKGROUND.

Defendant was convicted of multiple counts of robbery and murder on February 4, 1999. On July 6, 1999, he was sentenced to life plus 300 months in prison. (See Doc. 242, Judgment and Commitment.) His conviction and sentence was upheld by the Ninth Circuit on September 8, 2000, and his petition for a writ of certiorari was denied by the United States Supreme Court on February 26, 2001. Defendant was represented by Gerald Ray

1 Lewis, Esq. at trial and by Patience Milrod, Esq. on appeal.

2 In March 2001, defendant contacted Milrod's office to obtain
3 his case file. Milrod's office agreed to send the file to
4 defendant and contacted the United States Penitentiary at Lompoc,
5 where Defendant was incarcerated, to discuss the transfer of the
6 files. Officials at Lompoc indicated that they had no space in
7 which to store the five boxes of material and suggested that
8 Milrod's office mail the boxes to Defendant's family at a Montana
9 address. The boxes were mailed to the address provided on March
10 13, 2001. The Montana address turned out to be that of another
11 inmate, Vernon Richardson. Throughout the summer of 2001, Ms.
12 Milrod's office undertook extensive efforts to locate the boxes,
13 including contacting prison officials, the postal service, and
14 eventually Congressman Radanovich's Office. (See letter from C.
15 Lugge to B. Small, dated Oct. 16, 2001, attached to Doc. 340.)

16 On October 4, 2001, Defendant filed a motion to extend the
17 time for filing a petition for writ of habeas corpus under 28
18 U.S.C. § 2255, on the ground that his case file had been
19 misplaced. (Doc. 321.) In response, the district court ordered
20 defendant to "notify the court immediately upon receipt of the
21 file," and indicated that defendant's "request for time extension
22 will then be considered and acted upon." (*Id.* at 3.)

23 On June 27, 2002, Defendant informed the court that the
24 boxes could not be located. (Doc. 325.) Defendant then
25 requested that the district court provide him with "copies of his
26 trial transcripts, pre-trial motions and dispositions, sentencing
27 transcripts and a copy of the case docket sheet." (*Id.* at 2.)
28 In addition, defendant requested that the district court provide

1 defendant with a "complete copy of discovery papers regarding his
2 case," including "all police reports and FBI 302's [], witness
3 statements, photographs, list of tangible evidence presented at
4 the trial, and any other material relating to the case that [the
5 district court] may deem necessary for the preparation of
6 defendant's § 2255 motion." (*Id.*)

7 The district court ordered the United States to respond with
8 any opposition to Defendants' request, noting that "[i]t appears
9 good cause for reproduction of some of the records exists."
10 (Doc. 329, filed Aug. 22, 2002.) Defendant filed a brief in
11 support of his motions (Doc. 330, filed Sept. 15, 2002), the
12 United States opposed (Doc. 331, filed Sept. 27, 2002), and
13 Defendant filed a reply (Doc. 332, filed Oct. 2, 2002). On
14 January 30, 2003 and September 2, 2003, Defendant renewed his
15 requests for adjudication of the case file and extension issues.
16 Finally, on May 4, 2004, Defendant filed a "motion to expedite
17 the proceedings." (Doc. 337.) The government filed a
18 supplemental response in opposition to Defendant's requests.
19 (Doc. 339, filed June 8, 2004.) Finally, on August 2, 2004,
20 Defendant filed a final brief in support of his requests,
21 asserting that the loss of his case file constituted
22 extraordinary circumstances warranting both an extension of time
23 and the reproduction of his case file. (Doc. 340.)

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II. DISCUSSION

A. Request for Extension of Time to File a Habeas Petition.

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (ADEPA), a one year statute of limitations applies to the filing of a petition for a writ of habeas corpus under 28 U.S.C. § 2255. The limitations period begins to run from the latest of:

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255. ADEPA's one year limit may be extended by equitable tolling, but only where "extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Espinoza-Matthews v. Cal.*, 432 F.3d 1021, 1026 (9th Cir. 2005). Determining whether equitable tolling is appropriate is a "highly fact-dependent" inquiry, *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir.2000) (en banc per curiam), and defendant "bears the burden of showing that equitable tolling is appropriate," *Espinoza-Matthews*, 423 F.3d at 1026.

The Ninth Circuit has repeatedly recognized that "it is unrealistic to expect a habeas petitioner to prepare and file a

1 meaningful petition on his own within the limitations period
2 without access to his legal file." *Id.* at 1028; *see also Spitsyn*
3 *v. Moore*, 345 F.3d 796, 801 (9th Cir. 2003); *Lott v. Mueller*, 304
4 F.3d 918, 925 (9th Cir. 2002). Equitable tolling has been
5 applied where a prisoner, despite repeated, "diligent" and well-
6 documented requests for access to his case materials, was denied
7 such access by prison officials while in Administrative
8 Segregation. *Espinoza-Matthews*, 432 F.3d at 1026-27.

9 Here, defendant and appellate counsel have worked diligently
10 to locate the missing case files. Defendant attaches to his
11 various pleadings correspondence between himself and appellate
12 counsel, and between appellate counsel's office, the United
13 States Postal Service, and the office of Congressman Radanovich.
14 (See Doc. 340 and attachments.) Defendant also apparently
15 attempted to contact both the public defender's office and his
16 co-defendant in an attempt to obtain copies of his case files,
17 but never received any response. (Doc. 333 at 2.)

18 The government urges the district court to follow United
19 *States v. Van Poyck*, 980 F. Supp. 1108 (C.D. Cal. 1997), where a
20 prisoner's request for equitable tolling was denied because he
21 had not shown that extraordinary circumstances prevented him from
22 timely filing his habeas petition. In *Van Poyck*, the defendant
23 asserted that (1) that he was "unable to prepare his § 2255
24 motion because he could not secure copies of certain transcripts
25 from various court reporters"; and (2) that during the two months
26 prior to his filing of the motion for extension, there were "four
27 general lockdowns, each lasting several days which...virtually
28 eliminated [] Defendant's access to the prison's Law Library

1 where there are but ten typewriters for the over one thousand
2 inmates here." *Id.* at 1110-111. The district court in *Van Poyck*
3 concluded that these reasons did not constitute extraordinary
4 circumstances, in part because the defendant failed to state why
5 the requested transcripts are "necessary for the preparation of
6 his motion." The *Van Poyck* court also emphasized that the
7 defendant had not established why "a few security lockdowns in
8 his place of incarceration over the last few months...made it
9 impossible for him to file his petition on time." *Id.* at 1111.

10 Even if this Court were to generously assume that
11 Defendant was unable to access the prison law library
12 for two weeks out of the last four months...he will
13 have still had fifty other weeks to prepare a § 2255
14 motion in his prison's library facilities.

15 *Id.* Finally, the *Van Poyck* court found particularly important
16 the fact that the defendant had "not argued that the
17 circumstances that purportedly support his Motion were caused by
18 events over which he had no control." *Id.*

19 The circumstances here are entirely distinguishable. First,
20 the loss of Defendant's entire case file appears to have been
21 entirely beyond his control. Unlike in *Van Poyck*, where the
22 lockdowns prevented the defendant's access to the law library for
23 short periods of time during the limitations period, the effect
24 of the misplacement of Defendant's entire casefile effected a
25 more continuous problem for Defendant. Finally, unlike in *Van*
26 *Poyck*, where the defendant complained of the absence of certain
27 transcripts from his legal materials, the loss of Defendant's
28 entire case file imposes a more substantial burden on Defendant's
ability to file a habeas petition.

1 Under the extremely unique circumstances of this case, where
2 Defendant's entire case file was lost for the entire limitations
3 period through no fault of his own, equitable tolling
4 is appropriate. The record indicates that Defendant's petition
5 for a writ of certiorari to the United States Supreme Court was
6 denied on February 26, 2001. He promptly contacted Ms. Milrod's
7 office to obtain his case file some time in March 2001, but never
8 obtained the materials. He is entitled to tolling of the entire
9 year-long limitations period.

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11 **B. Request for Reproduction of Missing Case Materials.**

12 Defendant also requests copies of various materials that
13 would likely have been contained within the lost case file boxes.
14 Specifically, Defendant requests that the district court provide
15 him with copies of:

- 16 (1) the trial transcripts,
17 (2) pre-trial motions and dispositions,
18 (3) the sentencing transcripts,
19 (4) and a copy of the case docket sheet.

20 In addition, defendant requested that the district court provide
21 defendant with a complete copy of discovery papers regarding his
22 case, including "all police reports and FBI 302's [], witness
23 statements, photographs, list of tangible evidence presented at
24 the trial, and any other material relating to the case that [the
25 district court] may deem necessary for the preparation of
26 defendat's § 2255 motion." (Doc. 325.)

27 The government appears to be correct in its assertion that
28 there is no directly analogous legal authority for the district

1 court to issue an order regarding the reconstruction of a lost
2 case file. (Doc. 339.) The most analogous precedent concerns
3 the provision of free transcripts to potential habeas
4 petitioners. Under most circumstances, a prisoner would not be
5 entitled to free copies of his trial transcripts unless a court
6 certifies that those transcripts are necessary to decide non-
7 frivolous issues in a pending habeas petition or other judicial
8 proceeding. See 28 U.S.C. 753(f); see also *Sistrunk v. United*
9 *States*, 992 F.2d 258, 259 (10th Cir. 1993); *United States v.*
10 *Lewis*, 605 F.2d 379, 380 (8th Cir. 1979). Here, unlike where a
11 prisoner desires transcripts in addition to whatever other legal
12 materials he may possess, Defendant has absolutely no legal
13 materials pertaining to his case on which to base a habeas
14 petition.

15 The government points out that a habeas petitioner does not
16 enjoy a presumptive entitlement to discovery, citing *Bracy v.*
17 *Gramely*, 520 U.S. 899, 903-05 (1997). But *Bracy* concerned
18 discovery materials that were never part of the underlying
19 criminal case against the prisoner. Here, Defendant is not
20 requesting any new "discovery," he is requesting copies of
21 discovery materials previously disclosed to him.¹

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24 ¹ The government also cites *United States v. Nelson*, 467
25 F.2d 1380 (9th Cir. 1972) in support of the proposition that a
26 prisoner is not entitled to discovery to prepare for a habeas
27 petition. But, *Nelson* concerned a prisoner who desired
28 essentially unfettered access to a wide range of evidentiary
materials. The Ninth Circuit held that he had no right to engage
in such a "fishing expedition." *Id.* This holding is simply
inapposite here, where Defendant is requesting materials
previously in his possession during the criminal process.

1 The government also asserts that "defendant could have
2 recreated his lost case file himself." (Doc. 339 at 7.)
3 Defendant and appellate counsel have taken extensive steps to
4 accomplish this, to no avail. As discussed, appellate counsel
5 went to great lengths to retrieve the missing files and defendant
6 contacted the public defender's office and his co-defendant, but
7 received no responses. Under such circumstances, reproduction of
8 basic portions of the record is appropriate to afford Defendant
9 an initial opportunity to frame a habeas petition.

10 The transcripts from trial, relevant motions hearings, and
11 sentencing proceedings have already been generated and are part
12 of the public record. Reproduction of these transcripts, along
13 with a current copy of the case docket, by the clerk of court is
14 the most efficient and effective way to provide Defendant
15 material on which he may frame a habeas petition. The district
16 court has no specific knowledge of or possession of discovery
17 materials. At this time, there is no showing that a non-
18 frivolous petition has been filed or how discovery materials
19 would be relevant.

20 **III. CONCLUSION**

21 The clerk of this court is ordered to reproduce copies of
22 all transcripts from the jury trial, motions hearings, orders,
23 and sentencing proceedings pertaining to Defendant James Lamont
24 Richardson. These copies shall be forwarded to defendant within
25 30 days of the date of this order along with a current copy of
26 the case docket.

27 Defendant's motion for an extension of time in which to file
28

1 a petition for writ of habeas corpus under 28 U.S.C. § 2255 is
2 **GRANTED.** He shall have one year from receipt of the above-
3 mentioned transcripts and docket to file his petition.

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5 **SO ORDERED.**

6 Dated: April 27, 2006

/s/ OLIVER W. WANGER

7 **OLIVER W. WANGER**
8 **United States District Judge**
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